that it will necessarily be so regarded in the courts of other States: Eureka Ins. Co. *v.* Parks, 1 Cin. Super. Ct., 574.

A foreign corporation may not, however, take advantage of its own non-compliance with such statutes, and suit may be brought against it notwithstanding such default. Hagerman *v.* Empire Slate Co., 97 Pa., 534.

It has also been held that where a foreign corporation has failed to comply with such statutes any one attempting to act as its officer or agent is personally liable on contracts made by him in behalf of the corporation, though no such penalty is provided by statute: Lasher *v.* Stimson, 1 Adv. Rep. (S. C. of Pa.), 208.

THE PROPER CONSTRUCTION OF SUCH STATUTES.

A review of the decisions has led the writer to the conclusion that the construction put upon these statutes by the courts of the various States has often been arbitrary and without due consideration of the consequences which follow therefrom.

As has been pointed out by Mr. MORAWETZ in his admirable work on Private Corporations, the primary object of such statutes is to protect parties dealing with these companies from imposition and to secure jurisdiction over them in the local courts, not to render the contracts and dealings of corporations which have not complied with their provisions void and unenforceable. Where the statute does not declare that such a result shall follow from such omission, it ought not to be inferred by the courts. The same principles which have been applied in determining the effect of acts of corporations in excess of their chartered powers should govern in deciding the status of contracts made by corporations which have failed to comply with the provisions of such statutes.

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POST PUBLISHING CO. *v.* MOLONEY.[1] SUPREME COURT OF OHIO.

Libel—Privileged Communication—Criticism of Public Officer.

It is libelous *per se* to print and publish of a person that he "is said to have been in the workhouse, and to have had a criminal record;" and

[1] Reported in 33 N. E. Rep., 921.

though it is the unquestioned right of the press, as of individuals, to freely criticise and comment upon the official action and conduct of a public officer, yet false and defamatory words affecting his private character, spoken or published of him as an individual, are not privileged merely on the ground that they relate to a matter of public interest, and are spoken or published in good faith.

THE RIGHT TO CRITICISE PUBLIC OFFICERS AND CANDIDATES FOR OFFICE, AND ITS LIMITATIONS.

I. *Criticism of Public Officers.*— It is a well-settled rule of law that words spoken or published of one in an office, profession, trade, or business, in relation to that office, profession, trade, or business, which naturally tend to injure him therein, are actionable, without proof of special damage; and for this reason many expressions hich would be no ground for action by a private individual, are *per se* actionable when used in regard to one in an office or business. This is especially true of public officers whose position renders them peculiarly liable to attacks of this kind, and whose tenure of office depends largely upon public favor; and not only will words actionable when used of a private person be so when used of them, but, in addition, any false imputation of unfitness, misconduct, or corruption in the discharge of the duties of his office, cast upon an elective or appointive officer, which tends to degrade him in the eyes of the public, to lessen the emoluments of his office, to expose him to punishment, or to cause his removal from office, is actionable *per se:* Cæsar *v.* Curseny, Cro. Eliz., 305; Taylor *v.* How, Cro. Eliz., 861; Kemp *v.* Housgoe, Cro. Jac., 90; Burton *v.* Tokin, Cro. Jac., 143; Isham *v.* York, Cro. Car., 15; Stuckley *v.* Bulhead, 4 Coke Rep., 16*a*; Strode *v.* Holmes, Styles, 338; Woodruff *v.* Wooley, 1 Vin. Abr., 463; Carn *v.* Osgood, 1 Lev., 280; Aston *v.* Blagrave, 1 Stra., 617; Kent *v.* Pocock, 2 Stra., 1168; Adams *v.* Meredew, 3 Y. & J., 219; Goodburne *v.* Bowman, 9 Bing., 532; May *v.* Brown, 3 B. & C., 113; Booth *v.* Briscoe, 2 Q. B. D., 496; Dole *v.* Van Rensselaer, 1 Johns. Cas., 330; Sanderson *v.* Caldwell, 45 N. Y., 398; Hook *v.* Hackney, 16 S. & R., 385; Stow *v.* Converse, 3 Conn., 325; Hartford *v.* State, 96 Ind., 461; Robbins *v.* Treadway, 2 J. J. Marsh (Ky.), 540; Curtis *v.* Mussey, 6 Gray (Mass.), 261; Gove *v.* Blethen, 21 Minn., 80; Lansing *v.* Carpenter, 9 Wis., 540; Spiering *v.* Andrae, 45 Wis., 330; Cotulla *v.* Kerr (Tex.), 11 S. W. Rep., 1058. Such are words imputing bribery to a justice of the peace: Pepper *v.* Gay, 2 Lutw., 1288; Lindsey *v.* Smith, 7 Johns. (N. Y.), 360; to a commissioner: Moor *v.* Foster, Cro. Jac., 65; to a state attorney: Chipman *v.* Cook, 2 Tyler (Vt.), 456; to a judge: Royce *v.* Maloney, 58 Vt., 437; charging a justice with partiality: Masham *v.* Bridges, Cro. Car., 223; with perverting justice: Beamond *v.* Hastings, Cro. Jac., 240; or with procuring a person to take a false oath: Chetwind *v.* Meeston, Cro. Jac., 308; and charging an election officer with fraudulently and corruptly destroying a vote legally cast: Dodds *v.* Henry, 9 Mass, 262; or with making a fraudulent and wilful miscount of the votes cast: Ellsworth *v.* Hayes, 71 Wis., 427. In the days when the

harsh laws against Roman Catholics were in force in England, it was actionable to charge an official with being a Papist: Clarges *v.* Rowe, 3 Lev., 30. But when the words spoken or published are so far ambiguous that they will bear a reasonable meaning other than the defamatory one imputed to them, they will not be construed as libelous: Hollis *v.* Briscow, Cro. Jac., 58; Purdy *v.* Rochester Printing Co., 96 N. Y., 372.

There is another general rule, however, which comes in conflict with and often suspends the operation of the former, so far at least as public officers are concerned. This is the rule that any communication or publication made by one having an interest or duty in regard to the subject-matter, to others having a corresponding interest or duty, in good faith and upon probable cause, is considered as privileged by the occasion, and exonerates the person who makes it from any legal responsibility therefor. The peculiar applicability of this rule to the case of a public official is patent. Every member of the community, under our system of government at least, has a direct and personal interest in the proper administration of each and every public office; and, as a necessary corollary, possesses the right to criticise and comment upon the official acts of the incumbent freely and without liability so long as the criticism is made in good faith and with due regard to truth, and goes no further than the occasion warrants, even though the criticism and comment be founded on a mistaken view of the situation: Kelly *v.* Tinling, 1 L. R. Q. B., 699; Henwood *v.* Harrison, 7 L. R. C. P., 606; Crane *v.* Waters, 10 Fed. Rep., 619; Miner *v.* Detroit Post and Tribune Co., 49 Mich., 358; Jackson *v.* Pittsburgh Times, 31 W. N. C., 389. "Provided a man, whether in a newspaper or not, publishes a comment on a matter of public interest, fair in tone and temperate, although he may express opinions that you may not agree with, that is not a subject for an action for libel, because whoever fills a public position renders himself open to public discussion, and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position:" Kelly *v.* Sherlock, 1 L. R. Q. B., on p. 689.

This freedom of criticism, however, is confined to fair comment upon the *official* acts of its object, and does not permit or justify, under the guise of criticism, an assault upon his private character. The imputation of base, unworthy or corrupt motives, if false, is not privileged; for the falseness of the charge is *prima facie* evidence of malice, and malice will render even the truth actionable. "A person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than his private property:" Post Pub. Co. *v.* Moloney (Ohio), 33 N. E. Rep., 921 (the principal case). "There is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives, by which that conduct may be supposed to be governed. And if one goes out of his way to asperse the personal character of a public man, and to ascribe to him base and corrupt motives, he must do so at his peril:" Negley *v.* Farrow, 60 Md.,

158. One case, Seymour *v.* Butterworth, 3 F. & F., 372, seems opposed to this view, and holds that the private character of a public officer may be criticised when it tends to prove or disprove his fitness for the place he holds. But this must be understood as qualified by the condition that the criticism be true in order to be justifiable, for such is the unanimous doctrine of the other cases: Parmiter *v.* Coupland, 6 M. & W., 105; French *v.* Vifquaim, 11 Neb., 280; Thomas *v.* Croswell, 7 Johns. (N. Y.), 264; Cramer *v.* Riggs, 17 Wend., 210; Hamilton *v.* Eno, 81 N. Y., 116; Barr *v.* Moore, 87 Pa., 385; Wilson *v.* Noonan, 19 Wis., 105; Prosser *v.* Callis (Ind.), 19 N. E. Rep., 735; Bourreseau *v.* Detroit Evening Journal (Mich.), 30 N. W. Rep., 376; Augusta Ev. News *v.* Radford (Ga.), 17 S. E. Rep., 612; Collins *v.* Dispatch Pub. Co., 31 W. N. C., 316.

It is equally, or perhaps even more unjustifiable, to falsely charge a public man with specific acts of malfeasance in office, for this not only involves an assault upon his private character, but cannot even claim the excuse of being a reasonable inference. "The right of criticism upon the conduct of a public officer does not embrace any right to make a false statement of his acts, involving his integrity or faithfulness in the discharge of his duties:" Hay *v.* Reid (Mich.), 48 N. W. Rep., 507. "The distinction cannot be too clearly borne in mind between comments or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct:" Davis *v.* Shepstone, 11 App. Cas., 187. The falseness of the charge is the basis of responsibility. A falsehood is never privileged: State *v.* Schmitt, 49 N. J. L., 579; Briggs *v.* Garrett, 111 Pa., 404. Whoever makes such a charge, therefore, is liable; and it makes no difference whether he believed in the truth of it or not. That belief cannot affect his responsibility; if it has any effect on the matter whatever it can only go to mitigate the damages. It is his business to ascertain the truth of the charge before he gives it to the world: Harle *v.* Catherall, 14 L. T. (N. S.), 801; Campbell *v.* Spottiswoode, 3 B. & S., 769; Wilson *v.* Reed, 2 F. & F., 149; Woodard *v.* Dowsing, 2 Mann & Ry., 74; Cheese *v.* Scales, 10 M. & W., 488; McDonald *v.* Woodruff, 2 Dill. (U. S.), 244; Russell *v.* Anthony, 21 Kans., 450; Com. *v.* Clap, 4 Mass., 163; Com. *v.* Wardwell, 136 Mass., 164; Foster *v.* Scripps, 39 Mich., 376; Larrabee *v.* Minn. Tribune Co., 36 Minn., 141; Littlejohn *v.* Greeley, 13 Abb. Pr. (N.Y.), 41; Henderson *v.* Commercial Advertiser, 46 Hun. (N. Y.), 504; S. C., aff., 111 N. Y., 685; *Re* Moore, 63 N. C., 397; Eviston *v.* Cramer, 57 Wis., 570; Rowand *v.* De Camp, 96 Pa., 493.

The whole subject is very well summed up in the following extract from the opinion of Judge TRUNKEY in Neeb *v.* Hope, 111 Pa., 145: "The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published with fitting comments or strictures. But a line must be

drawn between hostile criticism upon public conduct and the imputation of bad motives, or of criminal offences, where such motives or offences cannot be justly and reasonably inferred from the conduct. A man has no right to impute to another, whose conduct is open to ridicule or disapprobation, base, sordid or wicked motives, unless there is so much ground for the imputation that a jury shall find not only that he had an honest belief in the truth of his statements, but that this belief was not without foundation. When the conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but well founded, an action is not maintainable."

But while public criticisms on public men must be fair, and have a reasonable foundation in order to be privileged, a wider protection is given to memorials or petitions addressed to those in authority, praying for the removal of inferior officers, or the redress of fancied grievances. When these are preferred to the proper authority they are *prima facie* privileged, and express malice must be shown before that privilege can be taken away: Lake *v.* King, 1 Lev., 240; Woodward *v.* Lander, 6 C. & P., 548; Harrison *v.* Bush, 5 El. & Bl., 344; White *v.* Nicholls, 3 How. (U. S.), 266; Young *v.* Richardson, 4 Ill. App., 364; Thorn *v.* Blanchard, 5 Johns. (N. Y.), 508; Van Wyck *v.* Guthrie, 4 Duer. (N. Y.), 268; Van Wyck *v.* Aspinwall, 17 N. Y., 190; Kent *v.* Bongartz, 15 R. I., 72; Harris *v.* Huntington, 2 Tyler (Vt.), 129; Larkin *v.* Noonan, 19 Wis., 82. *Contra*, Bodwell *v.* Osgood, 3 Pick., 379. But if malice is shown, the mere fact that it is vented through a petition will not privilege the publication: Howard *v.* Thompson, 21 Wend. (N. Y.), 319. Whenever a person "under the insidious mask of consulting the public welfare, renders the investigation of the conduct of a public officer the mere vehicle of private malevolence, and a jury on the trial shall be fully satisfied that the publication was wanton and malicious, and without probable cause, he has no pretensions to escape unpunished:" Gray *v.* Pentland, 2 S. & R., 23. Malice in publishing a petition may be inferred where it was printed and circulated, but never in fact presented to the legislature: State *v.* Burnham, 9 N. H., 34. If presented to the wrong party, however, under a *bona fide* mistake, it will still be privileged: King *v.* Bayley, 3 Bac. Abr., Tit. Libel, A. 2; Fairman *v.* Ives, 5 B. & Ald., 642; McIntyre *v.* McBean, 13 U. C. Q. B., 534. *Contra*, Blagg *v.* Sturt, 10 Q. B., 899.

II. *Criticism of Candidates for Office.* — It has been frequently claimed that a much broader license of criticism exists with regard to candidates for office than is conceded with respect to those holding office. It is said that the very fact of candidacy puts the character of the candidate in issue, so far as his qualifications and fitness for the office are concerned, and the publication of the truth in this regard cannot injure him, because the public have a right to be informed of the character of those who seek their votes: Comm. *v.* Clap, 4 Mass., 163; Comm. *v.*

Odell, 3 Pitts. (Pa.), 449; Mayrant *v.* Richardson, 1 Nott & McC., 347. This much is cheerfully conceded; but the further claim, made in a few cases, that the publication of falsehood concerning a candidate is privileged if made with an honest belief in its truth, is opposed to every principle of right and justice, and is borne down by an overwhelming weight of authority. "It would be a strange doctrine indeed," said Chief Justice MANSFIELD in Harwood *v.* Astley, 1 Bos. & Pul., N. R. 47, "that when a man stands for the most honorable situation in the country, any person may accuse him of any imaginable crime with impunity." The fallacy of such a doctrine is clearly exposed in Bronson *v.* Bruce, 59 Mich., 467: "It would deter all sensitive and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled and unworthy; to men who have no character to lose, no reputation to blemish. It could scarcely be expected that any man worthy of the position would consent to stand for an office and have his reputation tarnished, his good name scandalized, in the face of the whole community, if such a doctrine as this is to prevail. Besides, under the guise of assisting the people to select a fit man, the voters are deceived by falsehood, and induced to withhold their support from the maligned candidate, and so two wrongs are perpetrated —one upon the candidate, the other in misleading the voter." To the same effect are most of the cases: Duncombe *v.* Daniell, 8 C. & P., 222; Wisdom *v.* Brown, 1 Times L. R., 412; Pankhurst *v.* Hamilton, 3 Times L. R., 500; Jones *v.* Townsend, 21 Fla., 431; Comm. *v.* Wardwell, 136 Mass., 164; Aldrich *v.* Press Printing Co., 9 Minn., 133; Smith *v.* Burrus (Mo.), 16 S. W. Rep., 881; Wheaton *v.* Beecher, 66 Mich., 307, S. C., 33 N. W. Rep., 503; Lewis *v.* Few, 5 Johns, 1; Root *v.* King, 7 Cow., 613; King *v.* Root, 4 Wend., 113; Powers *v.* Dubois, 17 Wend., 63; Turrill *v.* Dolloway, 17 Wend., 426 (but see S. C. 26 Wend., 383); Harwood *v.* Keech, 4 Hun. (N. Y.), 389; Seely *v.* Blair (two cases), Wright (Ohio) 358 and 683; Vanarsdale *v.* Laverty, 69 Pa., 103; Brewer *v.* Weakley, 2 Overton (Tenn.), 99; Banner Pub. Co. *v.* State, 16 Lea. (Tenn.), 176; Sweeney *v.* Baker, 13 W. Va., 158. The boasted liberty of the press, even, has been invoked to spread its ægis over this wanton attempt to violate the honor of humanity; but to no purpose: Jones *v.* Townsend, *supra;* Sweeney *v.* Baker, *supra.*

This being the weight of authority, it is, perhaps, worth while to examine the cases which make against it: State *v.* Balch, 31 Kans., 465, was a criminal case, and, of course, lack of criminal intent could be shown, and Marks *v.* Baker, 28 Minn., 162, bears clear proof of the existence of probable cause, so that whatever else was said in either was but a dictum. The others simply claim that a man should not be held responsible for what he publishes *bona fide,* upon probable cause and with an honest belief in its truth, even though it be in fact untrue: Mott *v.* Dawson, 46 Iowa, 533; Bays *v.* Hunt, 60 Iowa, 251; Express Printing Co. *v.* Copeland, 64 Tex., 354; Briggs *v.* Garrett, 111 Pa., 404. Is this contention correct?

The answer depends upon what is meant by probable cause. If by that is meant information picked up anywhere and anyhow, the answer is most decidedly in the negative. In these days of so-called political methods, by which name it is sought to cover the nakedness of everything that is base, dishonorable and unmanly, no man has a right to rely upon what is told him to the discredit of a candidate for office without making some independent effort to ascertain the truth of the report. Who is to be believed when a gentleman of high social position, proprietor of a widely read and influential newspaper, acknowledges that he knew a report printed therein to be false *when it was published*, but excuses himself on the ground that it was during a campaign? As if that could justify a lie!

This was the fundamental error into which the Court fell in Briggs *v.* Garrett, 111 Pa., 404. Mr. Garrett was chairman of an organization intended to purify politics in the city of Philadelphia, known as the "Committee of One Hundred," and at one of the public meetings of that body, at which several reporters were present, he handed the secretary a letter which he had received from a citizen of Philadelphia, containing a serious but false imputation upon the honor and character of Judge Briggs, then a candidate, and requested him to read it aloud. This was done. There was no question as to the purity of Mr. Garrett's motives; but there was also no proof that he knew the writer of the letter, and every proof that he made no effort to discover whether the charge made was true or false, whereas he could have easily discovered its falsity. The Supreme Court, starting out with the undeniable principle that no lie is privileged, devoted considerable labor to a very brilliant and specious effort to prove that this particular lie was privileged because it came at second hand. But this has been very fully refuted in Banner Publishing Co. *v.* State, 16 Lea (Tenn.), 176, in an opinion which, unhappily, is too long to quote, and, moreover, failed to meet the approbation of the three most able judges on the bench—Chief Justice MERCUR and Justices GORDON and STERRETT. It would be hard to find any principle that will support it. A lie is a lie, by whomsoever made; and he who asserts a fact to be true, without knowing it to be so, is as guilty of falsehood as he who asserts a fact to be true that he knows to be not true. By the method of publication adopted, Mr. Garrett made the falsehood contained in the letter his own, and the case was aggravated by his neglect to inquire into its truth; for had he done so, and discovered its falsity, he would never have given it to the world. On every ground, then, the authority of Briggs *v.* Garrett fails; and there is no good reason for abandoning the doctrine of the majority of the cases, unless we qualify it by admitting probable cause (not probable surmise) as an element of privilege in cases where the statement is made on reliable authority, and there are no means of investigating its truth. Where such means exist, no bare reliance upon the word of another should ever, in such a case, be allowed to establish probable cause. The very neglect to use the means of investigation within reach is a clear proof of want of good faith.

But though it cannot wholly ex-

onerate, alleged good faith in thus attacking the character of a candidate may go in mitigation of damages. "There should be no unreasonable responsibility where there is no actual malice:" Bailey *v.* Kalamazoo Pub. Co., 40 Mich., 251; Bronson *v.* Bruce, 59 Mich., 467; Belknap *v.* Ball (Mich.), 47 N. W. Rep., 674. But this is denied in Rearick *v.* Wilcox, 81 Ill., 77.

When a candidate is seeking an appointive office, the communication should be made to the person or persons in whom the power of appointment is vested; and a communication made to the public through a newspaper in regard to a candidate for such an office does not stand on the same footing of privilege as if made to the appointing power: Hunt *v.* Bennett, 19 N. Y., 173.

Finally, the right of criticism of public officers and candidates for public office may be thus defined: Any one has a right to criticise and comment upon the official acts and qualifications of an officer or candidate, freely and fully, provided it be done fairly and in good faith and be kept within the bounds of truth, no matter how injurious that truth may be; but no one has any right to criticise or comment upon the private life or character of an officer or candidate, except so far as the same may affect his fitness for the office he holds, or aspires to hold, and even then he cannot claim privilege if his criticism or comment be made unfairly or untruthfully. Still less has any one a right to charge an officer or candidate falsely with acts injurious to his reputation, and even a claim of probable cause cannot save the accuser, unless he have made some honest effort to ascertain the truth of the charge. If he heedlessly repeats a charge made by another, his good faith and claim of probable cause cannot wholly exonerate him. They can only go in mitigation of damages.

[NOTE.—There is a very interesting and instructive article on "Criticism and Fair Comment," by CHARLES C. TOWNSEND, Esq., with an accompanying note by A. R. HAIG, Esq., published in 30 Am. Law Reg., 517, to which, though their conclusions differ somewhat from those reached above, the reader is referred for a discussion of the broad subject, of which only a minor division is treated in the preceding annotation.]

R. D. S.